

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36022

EDWARD DEAN BOYLAN,	)	2010 Unpublished Opinion No. 394
	)	
Petitioner-Appellant,	)	Filed: March 24, 2010
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
STATE OF IDAHO,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Respondent.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Ronald J. Wilper, District Judge.

Order dismissing application for post-conviction relief, affirmed.

Jeffrey Brownson of Nevin, Benjamin, McKay & Bartlett, LLP, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Rosemary Emory, Deputy Attorney General, Boise, for respondent.

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MELANSON, Judge

Edward Dean Boylan appeals from the district court's order dismissing his application for post-conviction relief after an evidentiary hearing. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Boylan pled guilty to lewd conduct with a minor child under sixteen. I.C. § 18-1508. The district court ordered Boylan to complete a psychosexual evaluation (PSE). The psychosexual evaluator determined that Boylan was a moderately-high risk to reoffend and was not a candidate for community-based rehabilitation. The district court sentenced Boylan to a unified term of twenty years, with a minimum period of confinement of five years. This Court affirmed Boylan's judgment of conviction and sentence in an unpublished opinion. *State v. Boylan*, Docket No. 33344 (Ct. App. Apr. 25, 2007).

Boylan filed a pro se application for post-conviction relief. An amended application was filed after appointment of counsel alleging three claims of ineffective assistance of counsel and that his guilty plea was not knowing and voluntary. The district court granted an evidentiary hearing, and Boylan withdrew all of his claims except for a claim that counsel was ineffective for failing to adequately advise him that he had a Fifth Amendment right against self-incrimination during the PSE, that he was not required to participate, and that his participation could have a negative result on his sentence. After the evidentiary hearing, the district court denied Boylan's claim holding that trial counsel adequately informed Boylan that he had the right against self-incrimination during the PSE and was not required to participate. Furthermore, the district court held that Boylan had failed to show prejudice. Boylan appeals.

## II. ANALYSIS

In order to prevail in a post-conviction proceeding, the applicant must prove the allegations by a preponderance of the evidence. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 801 P.2d 1216 (1990). When reviewing a decision denying post-conviction relief after an evidentiary hearing, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. *Larkin v. State*, 115 Idaho 72, 73, 764 P.2d 439, 440 (Ct. App. 1988). We exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State*, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992).

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be

second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

This Court has recently articulated three essential factors which make up the prejudice determination in the context of an alleged *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2006) violation. *Hughes v. State*, \_\_\_ Idaho \_\_\_, \_\_\_, 224 P.3d 515, 531 (Ct. App. 2009). The first factor is whether the content of the PSE itself is materially unfavorable. *Id.* This requires that the PSE be reviewed to determine its level of negativity based on the extent and harmful character of statements and admissions made by the applicant and the conclusions of the evaluator. *Id.* If the PSE is not materially unfavorable, then the second prong of the *Strickland* standard has not been met. *Id.* If the PSE is materially unfavorable to the applicant, the level of its negativity will then be weighed with two additional factors: the extent of the sentencing court's reliance on the PSE if it can be demonstrated from the record and the totality of the evidence before the sentencing court. *Id.*

The first factor focuses on the actual content of the PSE itself, not the extent of reference thereto by the sentencing court. It is presumed that the sentencing court would read a PSE which it ordered prior to sentencing. Therefore, regardless of any actual references to the PSE by the court at sentencing, the level of negativity of the PSE itself weighs on the determination of prejudice. Obviously, the more or less negative the PSE, the more or less weight it lends toward a finding of prejudice. The second factor focuses on the discernable reliance placed by the sentencing court on the information from the applicant recorded in the PSE and the conclusions based thereon by the evaluator. The third factor takes into consideration all of the evidence bearing on sentencing other than the PSE. Ultimately, in order to demonstrate prejudice, the balance of these factors must undermine the reviewing court's confidence that, absent consideration of the PSE, the sentence would have been the same. *Id.* \_\_\_ Idaho at \_\_\_, 224 P.3d at 531. *See also Strickland*, 466 U.S. at 695-96.

Boylan argues that he has shown prejudice because, he claims, the district court considered the PSE at sentencing. Boylan cites to *Estrada* for support for this proposition. This argument was explicitly rejected by this Court in *Hughes*, \_\_\_ Idaho at \_\_\_, 224 P.3d 530-31. Thus, our analysis will follow the principles of *Strickland* as they were applied in the framework articulated in *Hughes*.

First, we must consider Boylan's statements during the PSE as well as the evaluator's conclusions to determine whether the PSE was materially unfavorable. During the course of the PSE, Boylan admitted that he had an alcohol problem, but denied using any illegal drugs for the past twelve months and denied any criminal sexual history. He admitted to engaging in lewd conduct with the victim in this case, but claimed it was a consensual encounter begun by the victim's sexual advances. The evaluator concluded that Boylan was a moderately-high risk to sexually recidivate based on certain risk factors, including "poor treatment motivation, disrupted family history, negative social influences, attitudes supportive of abuse, history of poor cooperation with supervision, general self-regulation deficits, access to a potential victim pool if in the community, hostility, substance abuse, and history of domestic violence." However, the evaluator also concluded that Boylan was not a violent sexual predator. The evaluator recommended that specialized sexual offender treatment in a community-based setting was not appropriate, but that Boylan might benefit from treatment within a secured facility. The evaluator recommended that the district court impose sentence.

During Boylan's PSE interview, he did not admit to additional crimes which might increase his potential sentence. He simply related his contention that the sexual encounter was consensual. The record reveals that Boylan was eager to express his side of the story. At the evidentiary hearing, Boylan testified:

[PROSECUTOR]: When [the psychosexual evaluator] told you that anything you said to him could be used -- would be shared with the court, do you remember that?

[BOYLAN]: Yes.

[PROSECUTOR]: And so you knew that when you were talking to him, that everything that you told him would be reported to this court for sentencing?

[BOYLAN]: Exactly.

[PROSECUTOR]: And you wanted to go to [the evaluator]. Right?

[BOYLAN]: Yes.

[PROSECUTOR]: I mean, the reason you wanted to go to [the evaluator] was because you wanted to be sure to tell him your version of what happened. Right?

[BOYLAN]: Yes.

[PROSECUTOR]: And one of the ways that you did that was that you wanted to tell [the evaluator] that this was completely consensual. Right?

[BOYLAN]: Correct.

[PROSECUTOR]: And you talked with your attorney about your version of the events. Right?

[BOYLAN]: Yes.  
 [PROSECUTOR]: And including that you just absolutely believed that the intercourse that occurred between you and [the victim] was consensual?  
 [BOYLAN]: Yes.  
 [PROSECUTOR]: So that was important for you to get that out. Right?  
 [BOYLAN]: Of course.  
 [PROSECUTOR]: Including to the psychosexual evaluator?  
 [BOYLAN]: Yeah.  
 . . . .  
 [PROSECUTOR]: I just want to be sure with you, though, that your -- as I understand it, it was very important for you to go to that psychosexual evaluator and tell him that this was a consensual situation. Right?  
 [BOYLAN]: I figured, I thought it would help the case, yes, my case.  
 [PROSECUTOR]: And how did you think it would help your case?  
 [BOYLAN]: By telling the truth, not hiding anything.

The evaluator concluded that Boylan's statements were evidence that he had only accepted limited responsibility for his actions. The facet of Boylan's PSE that was most unfavorable to him was the evaluator's recommendation that specialized, community-based treatment was not appropriate because he was a moderately-high risk to recidivate and that the district court should impose sentence. However, even Boylan's trial counsel agreed at the sentencing hearing that community-based treatment was not reasonable when he argued: "I'm not going to stand here today and say that Mr. Boylan should get some sort of community-based treatment at this point. There would be no credibility to that statement whatsoever." Trial counsel instead advocated for placement in the retained jurisdiction program. We conclude that the PSE was materially unfavorable and that the level of negativity was moderate.

Next, we must weigh the level of negativity with the extent of the sentencing court's reliance on the PSE if it can be demonstrated from the record and the totality of the evidence before the sentencing court. The sentencing court had the PSE at the time of sentencing and the evaluation was mentioned during argument for both sides. However, the court did not mention the PSE or the extent of its reliance on the evaluator's recommendations during its pronouncement of sentence. The district court held:

I think that anything other than a prison sentence would depreciate the seriousness of the crime you've committed.

Whether or not there was any force involved is irrelevant. . . . [T]hat certainly would have been a more aggravating factor, but the fact of the matter is

the law says that it is an offense that carries with it the possibility of life in prison if a 31-year-old man engages in this kind of conduct with a 13-year-old girl, particularly a pretty vulnerable 13-year-old girl, and she was a vulnerable 13-year-old girl. She was somebody who is at risk to be preyed upon, especially if you know her history, frankly.

I think that the victim in your case was an innocent victim of the selfish and criminal and vile conduct of a 31-year-old adult man. And frankly, I think that granting you a period of retained jurisdiction is too light. I think that if I did that, that would depreciate the seriousness of the criminal conduct that you engaged in.

And the message I want to send to the community is that somebody who engages in this kind of conduct, of course you go to prison. And I ask rather rhetorically the same question that I ask a lot of people that I see in your shoes when these kind of cases come up. I ask: What did you think was going to happen if you got caught?

Well, you knew what would happen. You knew from the confront phone call when she talked to you on the phone. You said, "Well, I'm going to go to jail. If you tell anybody, I'm going to go to jail."

Of course you're going to go to jail, and you're going to go to jail for a long time. And the reason we do this is because you have no clue as to how badly you victimized somebody like [the victim] in a situation like this. You just don't have any idea. . . .

....

What I'm going to do -- I'll tell you what I realize that there was a comment that if you were a multiple offender, if this was a second offense this might be an appropriate case for prison. And by my way of thinking, I think if this were a second offense I think I'd send you to prison for the rest of your life and that would be the end of that. But in this case it is a first offense, so I'm not going to send you to prison for the rest of your life.

....

And I'm not going to retain jurisdiction.

From the district court's statements during sentencing, it is clear that the PSE (in particular, Boylan's disclosures to the investigator) played very little, if any, role in the court's determination to sentence Boylan to a period of incarceration in the state penitentiary. The district court also made it clear that, based on the facts of the case, probation and retained jurisdiction were not options that it was willing to consider. Therefore, we cannot conclude that the moderate negativity of the evaluator's recommendation weighed heavily in the district court's consideration.

Lastly, we weigh the negativity of the PSE with the totality of the evidence before the sentencing court. The facts revealed that Boylan took advantage of a young, teenage girl who

had a prior history of sexual abuse. In the early morning hours, Boylan and a friend took her and Boylan's stepdaughter to a secluded location to go four-wheeling. Boylan took the victim in his car and his stepdaughter rode with his friend. Shortly after arriving at the location, the two separated and Boylan proceeded up to the top of a hill. According to the victim, once they arrived at the top of the hill, Boylan forcibly removed some of her clothing and engaged in sexual intercourse with her. Later, during a confrontation phone call, Boylan told the victim that he could go to jail for a long time if anyone found out and instructed her to tell people that she had had a sexual relationship with a boyfriend in the event she became pregnant. Based on these facts, the district court held that anything less than a prison term would depreciate the nature of the offense. Therefore, this factor, as well as the limited extent to which the sentencing court relied on the PSE, do not undermine this Court's confidence that Boylan's sentence would have been the same even absent any consideration of the PSE. Accordingly, Boylan has failed to meet his burden of showing prejudice stemming from any alleged deficiency in counsel's performance and the district court did not err by dismissing these claims after an evidentiary hearing.

Boylan argues that the district court stated at the hearing on the state's motion for summary dismissal that it had considered the PSE. However, we have concluded that the district court's reliance was negligible based on a review of the record. Furthermore, the relevant inquiry focuses on the evidence before the district court at sentencing and what was said at that hearing. Because we conclude that Boylan has failed to meet his burden of showing prejudice, we do not consider Boylan's remaining arguments, including his claim that trial counsel's performance was deficient.

### **III. CONCLUSION**

Boylan has failed to meet his evidentiary burden of proving that he was prejudiced by any alleged deficient performance by trial counsel. Therefore, the district court did not err by dismissing his claim. Accordingly, the district court's order dismissing Boylan's application for post-conviction relief after an evidentiary hearing is affirmed. No costs or attorney fees are awarded on appeal.

Judge GUTIERREZ and Judge GRATTON, **CONCUR.**